STATE OF CALIFORNIA

Energy Resources Conservation
And Development Commission

In the Matter of:

Application for Certification
for the BLYTHE ENERGY PROJECT, PHASE II

Docket No. 02-AFC-01

ENERGY COMMISSION STAFF'S REPLY BRIEF

I. INTRODUCTION

On February 19, 2002, Caithness Blythe II, LLC (applicant) submitted an Application for Certification for the Blythe Energy Project Phase II (BEP II). On April 29, 2005, Energy Commission Staff (staff) submitted its Final Staff Assessment (FSA) and augmented it on June 2, 2005 with the Soil and Water Resources Final Staff Assessment Technical Report. On August 1 and 2, 2005, the Committee assigned to this proceeding held hearings to accept testimony on the various issues that remained in dispute. Staff and the applicant filed opening briefs on August 29, 2005. Staff's opening brief addresses many of the issues raised by the applicant; this reply brief responds to any additional assertions raised by applicant in its opening brief.

II. THE ENERGY COMMISSION MUST BASE ITS FINDINGS IN THIS CASE ON BEP II'S EVIDENTIARY RECORD, NOT ON THE FINDINGS OF BEP I AS APPLICANT CLAIMS.

The applicant claims that findings made in the BEP I Commission Decision require the Energy Commission to find that BEP II is in compliance with State water law and policy. This assertion fails for three reasons: 1) the BEP I

Commission Decision did not make any findings related to State water law and policy; 2) even if it had, the Energy Commission must base its findings regarding BEP II solely on evidence in this record and cannot simply rely on findings made in a previous proceeding; and 3) circumstances have changed and the BEP I Commission Decision did not analyze the cumulative impacts of BEP II.

A. THE BEP I COMMISSION DECISION DID NOT MAKE ANY FINDINGS REGARDING WHETHER THE GROUNDWATER WAS FRESH INLAND WATER UNDER RESOLUTION 75-58.

The BEP I Commission Decision clearly specifies only seven findings and conclusions in the Soil and Water Resources section; none of those findings and conclusions determine whether the water proposed to be used is fresh inland water under State Water Resources Control Board Resolution 75-58 (Resolution 75-58). Even though the decision states that the groundwater was not fresh "in the strictest sense" and had a high TDS level, it proceeded to apply the second prong of the test under Resolution 75-58. Applying the test implies that the proposed water source for BEP I is fresh inland water, subject to the two-prong test in Resolution 75-58. Such an analysis would not have been necessary if the decision had concluded that the groundwater was not fresh inland water. The basis of the Energy Commission's conclusion regarding compliance with State water law and policy appears to rest solely on the informal conclusion that alternative sources of water were not available and alternative cooling technologies would cost more than wet cooling. (BEP I Commission Decision, p. 207.)

Based on the record available to the Energy Commission during the BEP I proceeding, this was a valid conclusion. At that time staff concluded that there were no feasible alternative water supplies because they believed use of Rannell's Drain would have resulted in impacts of its own. (BEP I Commission Decision p. 198.) Thus, there was no evidence in the record on which the Energy Commission could have based a decision requiring BEP I to use an

alternative water supply. Since that time, however, staff has concluded that the impacts of using the Rannell's Drain irrigation return flow could be fully offset with a verifiable Water Conservation Offset Program (WCOP). Staff provided such evidence in this proceeding. Consequently, there is now substantial evidence that an alternative water supply is available to BEP II.

B. THE ENERGY COMMISSION IS NOT BOUND BY, AND CANNOT RELY SOLELY ON, CONCLUSIONS REACHED IN A PREVIOUS PROCEEDING.

The Commission's Decision must be based exclusively on the hearing and evidentiary record of this proceeding. (Cal. Code Regs., tit. 20, §1751(a).) The applicant has the burden of presenting substantial evidence to support its contention that BEP II will comply with State water law and policy and will not result in any significant adverse impacts to water resources. (Cal. Code Regs., tit. 20, §1748(d).) This burden does not shift or change simply because a similar power plant was previously certified. Substantial evidence is defined as enough relevant information and reasonable inferences from this information that a fair argument can be made to support this conclusion and consists of facts, reasonable assumptions predicated upon facts, and expert opinion supported by facts. (Cal. Code Regs., tit. 14, §15384.) Findings or conclusions made in a previous decision are not facts and do not constitute substantial evidence. Therefore, even if the BEP I Commission Decision contained findings or conclusions applicable to BEP II, the Commission could not merely defer to those findings or conclusions; it must analyze this project based upon the substantial evidence contained in this evidentiary record.

Nor can the Energy Commission rely on the BEP I Commission Decision as precedent. A decision may not be expressly relied on as precedent unless it is designated as a precedential decision by the agency. (Gov. Code, §11425.60(a).) BEP I was never designated as such by the Commission. And even if it had been, decisions are ordinarily precedential in so far as they interpret

law or policy. The applicant is not just asking that any conclusions reached in BEP I regarding the interpretation of law or policy be binding on BEP II, but also any factual conclusions. The application of the facts present in BEP I to law or policy, such as the conclusion that BEP I did not result in significant impacts, could not carry over to BEP II regardless of how similar the projects may be.

This situation is similar to one where an applicant wishes to construct an additional facility at a potential multiple facility site. Even under such a scenario, the Warren-Alquist Act directs the Commission to reconsider its prior determinations based on current conditions and feasible alternatives. (Pub. Resources Code, §25520.5(a).) The intent of this direction is clear: each project, even if similar to one already certified, and even if on the same site as one already certified, must be analyzed based on its own merits. The applicant does not cite to any legal authority that says otherwise.

Nor is deviating from a previous decision an abuse of discretion. Abuse of discretion exists only where the order or decision is not supported by the findings, or the findings are not supported by the evidence. (Code Civ. Proc., §1094.5(b).) Thus, so long as the Energy Commission's decision is supported by substantial evidence, it matters not if that decision, and the conclusions supporting it, differ from a previous decision. In fact, there would be an abuse of discretion if the Energy Commission were to rely solely on a previous decision, as the applicant urges, without taking into consideration the evidence presented in this proceeding.

To hold that a previous decision, especially one not declared precedent, still binds the Energy Commission on future decisions would create analytical and legal problems. The ability to analyze impacts evolves over time; the California Environmental Quality Act (CEQA) requires impacts to be analyzed based on current knowledge, not what was known four years ago when a similar project was approved. The applicant's insistence that the decision in BEP II must be

identical to BEP I even if there is evidence that shows a potential impact that was not identified in BEP I is not supported by law or policy.

C. THE CONCLUSION THAT BEP I WOULD NOT RESULT IN A SIGNIFICANT ADVERSE IMPACT TO WATER RESOURCES CANNOT BE RELIED UPON TO MAKE A SIMILAR FINDING IN BEP II.

There are several differences between the evidentiary record in BEP I and the record in this proceeding. One key difference is that in BEP I staff did not argue, or provide substantial evidence supporting an argument, that BEP I's water use would result in a significant adverse impact to water resources. (BEP I Commission Decision, p. 206.) At that earlier time staff had not yet identified the potential for degradation of the groundwater aquifer from project pumping. Upon further investigation, and with the doubling of groundwater pumping that will occur with BEP II, staff has concluded, and provided substantial evidence supporting this conclusion, that BEP II's use of groundwater will cause degradation of groundwater quality, leading to a significant adverse impact.

Additionally, at the time of the BEP I proceedings staff had not identified, or provided substantial evidence supporting, a significant adverse impact to the Colorado River system or downstream water users. At that time there were no restrictions on California's use of surplus Colorado River water and no indication that such restrictions were forthcoming. Therefore, there was no evidence in the record to support a finding that BEP I created a significant adverse impact to the Colorado River system or downstream water users. Since then, the Colorado River Board of California expressed concern over the status of the Colorado River water supply and BEP II's proposed use of the water, the Colorado River basin has experienced extended drought conditions, and California has had to drastically reduce its use of Colorado River water. Based on these changes and an independent analysis, staff concluded that placing yet another water-thirsty power plant in the same desert location would result in a significant adverse

impact to the Colorado River system and downstream users. (Letter to Terrence O'Brien of the Energy Commission from Gerald Zimmerman, Executive Director of the Colorado River Board of California, dated September 11, 2003, p. 1.)

Staff understands that the Energy Commission has an interest in being consistent to the extent possible, and does not believe that finding that BEP II does not comply with State water law and policy and results in significant adverse impacts to water resources is inconsistent with BEP I, based on substantial evidence in the record. In addition to the change in circumstances identified above and in staff's opening brief, one cannot ignore the large "change in circumstance" that occurs when a project's impact is doubled by the addition of another large power plant. Applicant's insistent reliance on the BEP I Commission Decision fails to acknowledge that nowhere in the document's 290+ pages does it state that the findings and conclusions would also hold for a second power plant at that location. For these reasons, the Energy Commission must focus on the substantial evidence in this proceeding.

III. BASED ON SUBSTANTIAL EVIDENCE IN THE RECORD, BEP II WILL NOT COMPLY WITH STATE WATER LAW AND POLICY AND WILL RESULT IN SIGNIFICANT ADVERSE IMPACTS TO WATER RESOURCES.

As discussed in staff's opening brief, BEP II is not consistent with State water law and policy and will result in significant adverse impacts to water resources. Because these issues were comprehensively discussed in that brief, staff here only addresses additional issues raised in the applicant's opening brief.

A. BEP II PROPOSES TO USE FRESH INLAND WATER UNDER RESOLUTION 75-58.

The applicant repeatedly refers to the groundwater as "brackish" despite the fact that the groundwater does not meet the definition of "brackish" contained in Resolution 75-58. Because Resolution 75-58 applies the State water policy to

the cooling water used by power plants, its definition of what is "brackish" and, therefore, allowable as non-fresh water for cooling, should apply to determining what is and is not "brackish." BEP II's proposed water source may have a higher TDS level than mountain spring water, but its chloride level does not meet the threshold in Resolution 75-58 and therefore is not brackish. (FSA Technical Report p. 4.9-17; RT 8/1/05 p. 171.) The BEP I Commission Decision did not conclude that the water was brackish. (BEP I Commission Decision, p. 207.) Simply calling it brackish does not make it so.

Under Resolution 75-58 a water source is considered "fresh inland waters" if it is suitable for domestic, municipal, or agricultural use. There is no requirement that it actually be used for these purposes, only that it is suitable for such use. The intent here is obviously to protect all water sources that could be put to any of these uses in order to ensure that such water is available for present or future needs. The groundwater proposed to be used by BEP II is currently used for domestic and agricultural purposes and, hence "suitable" for such use; thus, the groundwater easily meets the definition of "fresh inland waters" under Resolution 75-58.

Even if the groundwater met the definition of "brackish" it would still meet the definition of "fresh inland waters" and, thus, trigger application of Resolution 75-58 and the 2003 IEPR water policy. Resolution 75-58 clearly states that "application of the term 'brackish' to a water is not intended to imply that such water is no longer suitable for industrial or agricultural purposes." (Resolution 75-58, p. 3.) Thus, water can be "brackish" and still be "suitable for agricultural purposes" and, therefore, meet the definition of "fresh inland waters." This interpretation of "fresh inland waters" is in keeping with Resolution 75-58's purpose of "protect[ing] beneficial uses of the State's water resources." (Resolution 75-58, p. 2.) Therefore, even if the groundwater were brackish as applicant claims, its current use for agricultural irrigation proves that it is suitable

for use as a source of agricultural water supply and, as such, is "fresh inland water."

Once it is determined that a project is proposing to use fresh water for cooling, the next test is whether alternative water supply sources or alternative cooling technologies are feasible, both economically and environmentally. No comparison between the qualities of the fresh water source and alternative water sources are warranted.

B. RANNELL'S DRAIN IS A VIABLE ALTERNATIVE WATER SUPPLY THAT WOULD NOT ONLY ENSURE COMPLIANCE WITH STATE WATER POLICY AND LAW BUT WOULD ALSO ENSURE THAT SIGNIFICANT ADVERSE IMPACTS TO BOTH THE GROUNDWATER AQUIFER AND THE COLORADO RIVER SYSTEM AND DOWNSTREAM USERS ARE MITIGATED.

The applicant claims that Rannell's Drain is not an appropriate alternative water supply because its water is of better quality than the groundwater and its return flows are part of the Colorado River system.

All data from the past 30 years show that Rannell's Drain water is consistently higher in TDS than the groundwater proposed to be pumped by BEP II. (FSA Technical Report, pp. 4.9.A-8, 14; RT 8/1/05, pp. 173-174, 261-262.)The water quality samples relied upon by staff are currently valid and not "outdated" as the applicant claims. Current data, from 2002 and 2003, identify Rannell's Drain water as having a TDS level of 1,510-1,590 mg/l. (FSA Technical Report, p. 4.9.A-8.) In order for data to be outdated there must be updated information that supercedes it. The applicant did not provide any superceding data to support its assertion that this data is outdated or that Rannell's Drain water is of better quality than the groundwater nor did it contest the BEP I pumping data showing the groundwater has a TDS level of 920-1,000 mg/l. (FSA Technical Report p.4.9-17.) Expert opinion does not constitute substantial evidence unless it is

supported by facts. (Cal. Code Regs., tit. 14, §15384.) Therefore, applicant's unsupported testimony that Rannell's Drain water is better than the groundwater does not constitute substantial evidence.

With regard to applicant's claim that use of Rannell's Drain will result in a loss of surface water return flows to the Colorado River, a verifiable WCOP would offset BEP II's use of Rannell's Drain and any impacts to the Colorado River system would thereby be mitigated.

C. DRY COOLING IS AN ECONOMICALLY SOUND AND TECHNOLOGICALLY FEASIBLE ALTERNATIVE.

Applicant claims that requiring BEP II to use dry-cooling would "place it at an economic disadvantage" to BEP I. (Applicant's Opening Brief, p. 10.) The test, however, isn't whether an alternative cooling technology is economically disadvantageous, but whether it would make the power plant economically infeasible. (2003 Integrated Energy Policy Report, p. 41.) The purpose of siting new power plants is not so that they can out-compete power plants built just years before, but so that they can meet the increasing energy demands of California.

The applicant relies on the Southern California Edison (SCE) Request for Offers (RFO) to claim that dry cooling would force BEP II out of the market because of penalties imposed when the power plant is tripped offline and cannot provide electricity as scheduled. There are no assurances, however, that BEP II will ultimately succeed in the RFO process and be subject to the penalty provision. Even if the applicant ultimately obtains a contract with SCE, the penalty provision does not make dry-cooling economically infeasible. The applicant agrees that being tripped offline is no more frequent for a dry-cooled facility than for a wet-cooled facility. (RT 8/1/05 pp. 369-370.) It would be unusual for a baseload facility to have two or three trips a year and it would be unlikely for even an intermediate-load facility to have that many. (RT 8/1/05, p. 407.) Therefore,

there is no substantial evidence that the potential for the power plant to be tripped offline would make dry cooling economically infeasible.

D. THE DEGRADATION OF THE GROUNDWATER AQUIFER IS A SIGNIFICANT ADVERSE IMPACT EVEN IF NO CURRENT USERS WILL BE AFFECTED.

The applicant's sole justification for claiming that BEP II will not cause a significant adverse impact to the groundwater aquifer is its assertion that the impact is localized and no current well user will come into contact with the degraded zone of water produced by BEP II pumping. (Applicant's Opening Brief, p. 6.) CEQA does not require that an impact be regional in nature or affect a person before it can be found to be significant. A significant effect on the environment is defined as "a substantial, or potentially substantial, adverse change in any of the physical conditions within the area affected by the project including land, air, water, minerals, flora, fauna, ambient noise, and objects of historic and aesthetic significance." (Cal. Code Regs., tit. 14, §15382.) There is no requirement that the "area affected by the project" be regional, nor is there a reference in this definition to the change having to impact a person. Nor is there a requirement that a projected physical change must be immediate to be significant. (City of Santa Ana v. City of Garden Grove, (4th Dist. 1979) 100 Cal.App.3d 521, 531-533.) The unmitigated degradation of an aquifer is still a significant adverse impact even if no wells will immediately be affected and the impacts will occur over the life of the project.

With the availability of fresh inland water reduced with increasing demand from competing interests, it is likely that at some point someone will seek to rely on this groundwater. It is not prudent to allow its permanent degradation now simply because we cannot guarantee how it will be needed over time. The applicant agrees that upwelling of degraded water may occur and provides no evidence that, once such degradation occurs, it can be mitigated. (RT 8/1/05 p. 126-127.) Given the scarcity of fresh inland waters and the clear intent of State water law

and policy to protect such waters, staff believes that any unmitigable degradation of these waters is a significant adverse impact.

E. SUBSTANTIAL EVIDENCE IN THE RECORD SUPPORTS FINDING THAT THE APPLICANT'S PROPOSED WCOP WILL NOT MITIGATE BEP II'S IMPACTS TO WATER RESOURCES.

As discussed in staff's opening brief, substantial evidence in the record supports finding that BEP II's pumping of groundwater will result in significant adverse impacts to both the groundwater aquifer and to the Colorado River system and downstream users. The applicant argues that the mere fact that the United States Bureau of Reclamation (USBR) has stated that the WCOP satisfies their requirement is sufficient, in and of itself, for a finding that BEP II will not cause significant adverse impacts to the Colorado River system and downstream water users. If this were a LORS issue, then deference to the agency charged with implementing the LORS, along with some independent evaluation, would be appropriate. Whether the WCOP, as proposed by the applicant, mitigates the project's impacts to water resources, however, is an issue under CEQA.

As the CEQA lead agency, the Energy Commission must independently determine such matters based upon evidence in the record and cannot defer this evaluation to another agency. Moreover, the Energy Commission must ensure that there is an appropriate monitoring program in place if the WCOP is determined to be a mitigation measure to ensure that the WCOP is in fact conserving the same amount of water it is pumping. (Pub. Resources Code, §21081.6(a)(1).) The Colorado River Board supports staff's position that verification of the WCOP's implementation is critical to ensuring that "water unused for other reasons in the service area is not being credited against [BEP II's] water conservation offset program." (Letter to Terrence O'Brien of the Energy Commission from Gerald Zimmerman, Executive Director of the Colorado River Board of California, dated September 11, 2003, p. 4.) The BEP I

Commission Decision is not dispositive on this matter. As discussed above, in that proceeding the Energy Commission was not presented with evidence that the project's use of water would create a significant adverse impact to water resources; therefore, the Energy Commission did not have to determine whether the WCOP sufficiently mitigated a potential impact.

Even if one accepted USBR's acceptance of the WCOP for its regulatory purpose as evidence of mitigation, it still does not address the project's impact to the groundwater aquifer. As discussed above, BEP II's pumping of groundwater will cause substantial degradation of the groundwater aquifer which cannot be mitigated by any WCOP.

For these reasons, the applicant's WCOP does not contain sufficient provisions, including monitoring required under CEQA, to ensure that it would mitigate for BEP II's impacts to the Colorado River system and downstream users and USBR's acceptance of the program for its use does not change this fact.

IV. BEP II DOES NOT COMPLY WITH LORS DESIGNED TO ENSURE AIRPORT SAFETY.

As discussed in staff's Opening Brief, the Energy Commission must make its own LORS conformance determination and cannot rely on the City of Blythe's resolution because it carries no legal authority. The applicant's only response to staff's presentation of evidence showing that BEP II does not comply with LORS was to refer to the fact that BEP I was approved. As discussed above, the Energy Commission must make its findings based on substantial evidence contained in this record.

The evidentiary record in BEP I was different than that presented here; the agency charged with evaluating consistency with the Blythe Airport's Comprehensive Land Use Plan (CLUP), the Riverside County Airport Land Use Commission (RALUC), determined that BEP I was consistent with the CLUP.

(BEP Commission Decision, p. 257.) The Energy Commission deferred to the RALUC's determination and there was no other evidence or testimony in the record to suggest that the project did not comply with the CLUP. In this case, however, the RALUC determined that BEP II would be inconsistent with the CLUP and staff agreed with this determination. No evidence was offered to dispute this LORS inconsistency. Even if the City of Blythe's Resolution carried any legal authority, it only found that the financial benefits of the project outweighed any inconsistency; the City of Blythe did not find that the conditions it proposed would eliminate the inconsistency. Consequently, the Energy Commission can not rely on the City of Blythe's Resolution to conclude that BEP II is consistent with applicable LORS.

Moreover, the BEP I record contained no discussion of Public Utilities Code sections 21402 and 21403(c). In this proceeding, staff identified these two code sections, which prohibit any land use that would interfere with a pilot's ability to land at an airport, as applicable LORS with which BEP II would not comply. Therefore, there is substantial evidence in this proceeding that BEP II will not comply with all applicable LORS designed to protect airport safety. The applicant offered no testimony or legal argument upon which the Committee could base a different conclusion. Therefore, in order to approve BEP II the Energy Commission would have to override the non-compliance with LORS identified above. Due BEP II's adverse impacts to airport safety, staff does not believe an override is warranted in this situation.

V. THE CHANGES TO BLYTHE AIRPORT'S OPERATIONS PROPOSED BY APPLICANT DO NOT MITIGATE THE ADVERSE IMPACT TO AIRPORT SAFETY RESULTING FROM BEP II.

The applicant has proposed that construction of BEP II be conditioned on the completion of several changes to the operation of the Blythe Airport, including adding a remark to the Airport Surface Observing System (ASOS) warning pilots to avoid the plant and changing the landing pattern from a left-hand pattern to a

right-hand pattern to reduce overflight of BEP II, and the designation of another runway as the calm wind runway. These measures would require approval from the Federal Aviation Administration (FAA) and it is unclear if or when such approval could be obtained. If these measures are ultimately implemented, staff agrees that they could reduce the number of planes flying over BEP II, but they would not eliminate overflights of BEP II entirely. (FSA pp. 4.10-23, 28.) Planes could still overfly BEP II when flying a straight-in approach, by overshooting the turn on final approach, and by failing to notice that the landing pattern has changed. (Staff's Opening Brief, p. 6.) None of the measures proposed reduce the hazard to pilots who end up flying over BEP II; they simply try to reduce the number of times such overflights occur. The applicant's witness agrees that these measures would not prevent overflight of BEP II 100% of the time. Student pilots are the most likely to make mistakes that would place them over BEP II and are the least capable of calmly responding to a hazardous situation. (FSA p. 4.10-20.) The measures identified by the applicant would not sufficiently reduce the risk to these pilots. Because BEP II would not comply with LORS and would still present a hazard to pilots, even with the measures proposed, staff believes the project should not be certified at the proposed location.

VI. THE ENERGY COMMISSION MUST ADOPT CONDITIONS OF CERTIFICATION TO MONITOR BEP II'S COMPLIANCE WITH APPLICABLE TRANSMISSION SYSTEM ENGINEERING LORS.

The applicant argues that because the Western Area Power Authority (Western) will ipso facto comply with LORS, no conditions of certification concerning the interconnection are warranted. This argument ignores the Energy Commission's legal obligations. The Energy Commission certified the Buck Boulevard Substation as part of BEP I. (BEP Commission Decision, p. 80.) In order to make the modifications to the Buck Boulevard Substation necessary to interconnect BEP II, the applicant must seek Energy Commission approval. If the Energy Commission decides to grant this approval by certifying the proposed project, it has the prerogative to establish conditions of certification to ensure

that any modifications made at the substation comply with LORS and will not create significant adverse impacts to the environment.

In fact, the Energy Commission *must* establish a monitoring system to ensure that any project that it certifies is constructed and operated in compliance with applicable LORS. (Pub. Resources Code, §25532.) This requirement does not disappear simply because a Federal agency is involved. The Energy Commission has always required conditions of certification that monitored compliance with applicable LORS related to interconnecting with the grid, even when other parties, even Western, were undertaking the interconnection. The applicant has offered no reasonable explanation for why the Energy Commission should stop this mandated requirement here. As discussed in staff's opening brief, Western has agreed to work with staff and the applicant to comply with the conditions and there are options if such cooperation does not pan out. For the reasons discussed above, the Committee should reject applicant's proposed changes to the Transmission System Engineering conditions of certification and adopt those proposed by staff and used in numerous other siting proceedings.

VII. CONDITION OF CERTIFICATION SOCIO-2 IS THE ONLY MEASURE PROPOSED THAT WOULD AMELIORATE THE POTENTIAL DISPROPORTIONATE IMPACT TO MINORITY AND LOW-INCOME COMMUNITIES RESULTING FROM IMPLEMENTATION OF THE WCOP.

Staff concluded that BEP II's WCOP could result in a substantial loss of farm labor jobs, and thus result in a disproportionate impact to a minority and low-income community, if certain measures were not taken. The WCOP could significantly add to the job loss if it were allowed to fallow labor-intensive crops. For this reason staff proposed Condition of Certification Socio-2, restricting BEP II from fallowing labor-intensive crops. Staff also testified at the evidentiary hearing that the impact could also be addressed by a program designed to train displaced farm laborers for other occupations. (RT 8/2/05 p. 272.) The applicant's offer, contained in their opening brief, to conduct outreach to farm

laborers to let them know about certain training provided by the Community College does not ameliorate the disproportionate impact. Simply making people aware of a training program does nothing if they cannot qualify to participate in such training or qualify for jobs as a result of the training. Mr. Quentin Hanson, Executive Director of the Small Business Economic Development Center at the Palo Verde College, stated that most of the unions required a high school degree or GED. (RT 8/2/05 p. 289.) Any training provided by the Community College likely requires, at the very least, English literacy. There is no evidence that the farm laborers have either. Moreover, it does no good to pass out flyers in Spanish, one of the applicant's outreach proposals, if the training program requires one to know English. For these reasons applicant's offer of outreach does not address the disproportionate impact created by BEP II's WCOP and, therefore, Socio-2 should remain as proposed by staff.

VIII. THE APPLICANT AND STAFF HAVE AGREED TO LANGUAGE FOR CONDITION OF CERTIFICATION BIO-12.

Staff and applicant have agreed to the following language for Condition of Certification BIO-12:

BIO-12 The project owner shall discharge brine, distillate from the brine concentrator, and cooling tower blow down water to the evaporation ponds only in the cases of cooling system initial commissioning, maintenance, forced outages or emergency. The project owner shall notify the CPM in case of any discharge. At the earliest opportunity, when supported by plant operations, the water shall be pumped from the evaporation ponds to the cooling tower basin, brine concentrator or brine crystallizer (as appropriate) for processing until the evaporation ponds have been emptied.

The project owner shall prepare an Evaporation Pond Mitigation and Monitoring Plan to ensure that any impacts from the discharge are mitigated. If a substantial number of bird, wildlife, or protected species are found using the ponds, then remedial actions to reduce wildlife use to a less than significant level and to prevent nesting must be implemented. When such a discharge occurs to the evaporation pond, remedial measures shall be performed to

discourage nesting and reduce bird and wildlife exposure to the ponds. The project owner shall provide notice to the CPM and submit records of all monitoring dates, data collected, and any corrective actions taken in the Evaporation Pond Monitoring Report. After any facility closure of more than four (4) months, and at a time when the ponds do not have water in them, the ponds shall be cleaned if it is determined by the CPM the sediment presents a risk of contamination to wildlife. No clean-up of clean, untainted sediment that is windblown into the ponds is required.

The Evaporation Pond Mitigation and Monitoring Plan shall identify:

1. All biological resources to be impacted, avoided, or mitigated by evaporation pond use or closure;

2. A detailed description of all biological resources mitigation, monitoring, and compliance measures included in the Commission's Final Decision, the Federal and State Endangered Species Act, the California Environmental Quality Act, and the Migratory Bird Treaty Act;

3. A detailed description of methods to be used to avoid or discourage bird and wildlife use and to prevent nesting following any period of discharge;

4. Detailed description of remedial measures to be performed if initial methods do not meet specified condition;

5. The individual(s) who are responsible for monitoring and reporting;

6. The proposed dates, duration, number of times per year, and volume for discharges to the evaporation ponds;

7. Monitoring frequency and dates, weather conditions, data collected, reporting periods, and corrective actions to be implemented following a discharge;

8. The cleaning schedule after any discharge to the ponds;

9. Reporting periods to be followed in the case of any unplanned or emergency discharge;

10. Methods to remove chemical residue in the ponds should a facility closure occur for more than four months; and

11. Reporting periods following a facility closure for more than four months.

Verification: At least ninety (90) days prior to commencing construction of the evaporation ponds, the project owner shall provide two copies of the Evaporation Pond Mitigation and Monitoring Plan and all supporting materials to the CPM for review and approval.

The CPM, in consultation with the CDFG, USFWS, and any other appropriate agencies, shall determine the plan's acceptability within forty-five (45) days of receipt. Any modifications to the plan shall follow the same approval and time periods as those for the BRMIMP (BIO-5).

The project owner shall submit an Evaporation Pond Monitoring Report to the CPM on a monthly basis. The Evaporation Pond Monitoring Report shall include event specific details as requested in #7 – 10 above. The monitoring shall continue for at least the first three years of power plant operation, and depending on the results, could be discontinued after consultation with the CPM, CDFG, and USFWS if there is no evidence of significant wildlife exposure to the evaporation ponds.

IX. CONCLUSION

Applicant's primary argument appears to be that the Energy Commission certified BEP I, therefore it should automatically certify BEP II with no changes. As discussed above, however, the Energy Commission must evaluate each project on its own merits. Simply because the Energy Commission determined that a particular location at a particular time was able to accommodate one power plant, it does not necessarily follow that the Energy Commission must also find that a second project is also acceptable. In fact, the Energy Commission cannot rely on the conclusions and findings reached in BEP I where substantial evidence in the proceeding necessitates a different conclusion. Staff believes that substantial evidence in the record supports finding that BEP II will result in significant adverse impacts and will not comply with applicable LORS and,

therefore, recommends that the project not be certified until these matters are resolved.

DATED: September 7, 2005

Respectfully submitted,

LISA M. DECARLO
Staff Counsel

BEFORE THE ENERGY RESOURCES CONSERVATION AND DEVELOPMENT COMMISSION OF THE STATE OF CALIFORNIA

IN THE MATTER OF:

APPLICATION FOR CERTIFICATION FOR THE BLYTHE II ENERGY PROJECT

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**Revisions to POS List, i.e. updates, additions and/or deletions.*

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DECLARATION OF SERVICE

I Scott MacDonald declare that on 9-7-05, I deposited copies of the attached STAFF'S REPLY BRIEF in the United States mail at Sacramento, CA with first class postage thereon fully prepaid and addressed to those identified on the Proof of Service list above. Transmission via electronic mail was consistent with the requirements of California Code of Regulations, title 20, sections 1209, 1209.5, and 1210.

I declare under penalty of perjury that the foregoing is true and correct.

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* * * *

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